FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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REPLY BRIEF FOR THE PETITIONERS

The resolution of the issue which the Court did not have to answer in *Caputo* is now sharply in focus:

In extending the Act's jurisdiction ashore in 1972,

(1) did Congress intend to provide a uniform compensation system for amphibious workers who were covered prior to 1972 for only that part of their work done on navigable waters (as Petitioners contend)

or

(2) did Congress intend to cover "all waterfront workers who work on piers, wharves, terminals and other areas adjoining navigable waters" (as the Federal Respondent contends)?[1]

All agree the resolution of this issue turns on the meaning of the term "maritime employment" in the Act. The Court will recognize that the Federal Respondent's position here is substantially broader than his position in *Caputo,* where as the Court observed

> " '[M]aritime employment,' in his view, 'include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water.' " 432 U.S. at 272

In broadening its *Caputo* position on the maritime employment status test, the Federal Respondent in effect proposes that all coverage questions be based on situs only—*all waterfront workers* injured on the water or on an adjoining area ashore are covered.[2]

1. The Federal Respondent contends that all such waterfront workers "are engaged in maritime employment" (Br. p. 30), and that "Congress eliminated the distinction between work on board a vessel and work on the waterfront (ashore) for the purposes of making coverage determinations." (Br. p. 13).

2. The Court will recognize this as being the same as the holding of the Benefits Review Board discussed in Footnote 34 of the *Caputo* opinion, 432 U.S. at 272, which holding the Third Circuit set aside in *Maher Terminals, Inc. v. Farrell,* 548 F.2d 476, 478 (1977).

The "maritime employment" requirement for employers in Section 2(4) of the Act as originally passed in 1927 [33 U.S.C.A. § 902(4)] has been defined by the Court since 1930 as an employer who had at least one amphibious employee who performed part of his work on navigable waters.[2a] The Federal Respondent seeks to avoid having this established definition of "maritime employment" applied to the work of the employee now that the 1972 Amendments require the employees also to meet the "maritime employment" test.

The Federal Respondent attempts to obtain such a result by defining the term "longshoring operations" to include all marine terminal operations, and all waterfront work, even though the Secretary of Labor has since 1960 specifically defined the term "longshoring operations" as follows:

> "The term 'longshoring operations' means the loading, unloading, moving or handling of cargo, ship's stores, gear, etc., into, in, on, or out of *any vessel on the navigable waters* of the United States."[3] (Emphasis supplied).

2a. See full discussion in the Brief For The Petitioners, pages 19 to 30.

3. In 1958 Congress amended Section 41 of the Longshoremen's Act and authorized the Secretary of Labor to promulgate safety and health regulations for all employment covered by the Act. 33 U.S.C.A. § 941. These regulations were promulgated in 1960, and now appear as 29 C.F.R. 1918. The Secretary of Labor has made no change to date in the definition of longshoring operations contained therein. 29 C.F.R. 1918.3(i). Thus, the allegedly consistent position of the Director and Board since 1972 that this term includes all marine terminal operations is at odds with the Secretary of Labor's own definition which had been in effect for 12 years prior to the 1972 Amendments and has remained in effect unchanged ever since. Pursuant to this same Section 41 of the Act, the Secretary of Labor also has defined the other occupational terms used by Congress in the 1972 Amendments—shipbuilders, 29 C.F.R. 1916, ship repairmen, 29 C.F.R. 1915, and ship breakers, 29 C.F.R. 1917.

The jurisdictional limits both ashore and afloat of the Department of Labor's entire safety program for "longshoremen and other persons engaged in longshoring operations" have for nearly nineteen years been based on this definition. By the time Congress enacted the 1972 Amendments it has obviously proved to be a jurisdictionally workable definition for more than 12 years.[4]

Thus, Congress was not using undefined terms, and by no stretch of the imagination can Bryant's unloading of the cotton dray wagon or Ford's securing of the military vehicle on the railroad car be made to fit either definition.[5] One of the biggest problems in disregarding these already established definitions and groping for some new concepts, as the Federal Respondent would have us do, is that waterfront practices may vary from port to port, or region to region, or state to state. Navigable waters are the single common thread which runs nationwide, and it is the maritime part of amphibious employment (like Caputo's) which created the non-uniformity of compensation remedies in the historical context of Longshoremen's Act jurisprudence. Caputo was subject to being assigned to work both ashore and afloat, but Ford and Bryant were in no way subject to working on

4. Had it not been such a workable definition, the Secretary would surely have discussed it and changed it by 1972, or at least during the six years in which his Director of the Office of Workers' Compensation Programs and his Benefits Review Board have alleged that the Secretary's definition didn't go far enough ashore for compensation purposes.

5. Caputo met the Court's maritime employment definition because he was an amphibious worker. Contrary to the Federal Respondent's assertions, the Court did not hold that the loading of the truck by Caputo and the consignee's truck driver was a "longshoring operation." As the Court observed, Caputo was engaged in "the old fashioned process of putting goods already unloaded from a ship . . . into a delivery truck." 432 U.S. at 272.

navigable waters. Caputo was subject to the evil which Congress sought to eliminate—having his compensation benefits "depend on the fortuitous circumstance of whether the injury occurred on land or over water."[6] Ford and Bryant were not!

Although waterfront practices vary from port to port, the statutory jurisdictional standard must apply nationwide, and the Congress was acting in the historical context of Longshoremen's Act jurisprudence, not trying to reconcile traditional maritime practices (whatever those might be in any given port). Ever since *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), longshoremen's compensation jurisprudence has been oriented to and defined in the context of the navigable waters of the United States. It was navigable waters which compelled Congress to pass the Longshoremen's Act in 1927, and after some 42 years of attempting to apply it both ashore and afloat, this Court recognized that the original Longshoremen's Act was intended by Congress to deal solely with injuries seaward of the water's edge. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). This recognition established a clearly discernible standard for Longshoremen's Act jurisdiction (the navigable water's edge), but that standard had the disadvantage that persons covered by the federal remedy for part of their activity would walk out of coverage whenever they left the ship. Accordingly, limiting its post-amendment coverage to employees in maritime employment, the Congress in 1972 extended the relevant situs to adjoining areas ashore for the purpose, as articulated in the Committee Reports, of providing a uniform compensation system to those who were covered by the Act for that part of their activity on

6. S. Rep. 13; H.R. Rep. 10.

navigable waters. Note again that Congress was acting in the historical context of the Longshoremen's Act, which throughout its history has been oriented to and had its jurisdiction determined by the navigable waters. Note also that the navigable waters standard is also part of the definition of longshoring operations in the Department of Labor's own regulations.[7]

The Federal Respondent's attention to concepts of "traditional longshoring activities," which unquestionably vary on a nationwide basis as is demonstrated by comparison of the work practices described in *Caputo* with the work practices of the present cases, necessarily would require the resolution of continuing fact questions and would result in a variable standard on a nationwide basis, for the reason that practices traditional in one area may not be so in another. The Congressional adherence to the navigable waters, maritime employment concept familiar in Longshoremen's Act jurisprudence is not subject to these weaknesses. The common denominator nationwide is "navigable waters." It was "navigable waters" which required Congress to pass the Longshoremen's Act in 1927 when they would have preferred to leave it to the states. It was "navigable waters" which created the problem of non-uniform compensation coverage. That Congress intended "navigable waters" to be the basis on which the problem was solved is clearly demonstrated by the last sentence of the Committee Reports:

> "Thus, an individual employed by a person none of whose employees work, in whole or in part, on

7. 29 C.F.R. 1918.3(i), discussed *supra* at note 3. The pertinent language is: "* * * into, in, on, or out of any vessel on the navigable waters of the United States."

> navigable waters, is not covered even if injured on a pier adjoining navigable waters."[8]

COURT OF APPEALS AUTHORITY

The Federal Respondent's claim that the Board's "construction of the term 'longshoring operations' has been adopted by three of the six deepwater circuits and rejected in only one," (Br. p. 20, fn.12), is simply not true. Only the Fifth Circuit has done so, and in the present cases. The Fourth Circuit has not only declined

8. The Federal Respondent suggests the drafter of this sentence must have "simply ignored" the extension of the coverage ashore in Section 3(a) of the Act. 33 U.S.C.A. § 903(a). The Court has only recently rejected a similar suggestion of Congressional inadvertence from the Federal Respondent in No. 77-1465, *Director, OWCP v. Rasmussen, et al.*, ____U.S.____, decided February 20, 1979. The erroneousness of this assertion is graphically demonstrated by this same drafter's affirmative statements as to other persons who were not to be covered even though injured on a pier adjoining navigable waters.

1. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for (that) part of their activity (on navigable waters)." If an employee did not work at least part of his time on navigable waters, he did not have in 1972 and still does not have a uniformity problem. Contrast the uniformity problems the Federal Respondent's cover the waterfront approach will create for all employees who have to go onto the adjoining areas of the waterfront to do business with a marine terminal operator, but are not amphibious workers as they never have to go on navigable waters.
2. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity."
3. "Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." All of the above quotations are from the Committee Reports, S. Rep. 13; H.R. Rep. 10-11. (S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U. S. Code Cong. and Administrative News, pp. 4707-4708).

to accept the Board's view, but rejected it approximately two and one-half months after *I.T.O. Corp. v. Benefits Review Board,* 563 F.2d 646 (4th Cir. Sept. 22, 1977), on which the Federal Respondent relies.[9] The Fourth Circuit did so in *Conti v. Norfolk and Western Railway Company,* 566 F.2d 890, decided December 8, 1977. In *Conti,* the three injured employees were all engaged directly in the process of unloading coal from railroad cars into a hopper or receiving bin from which it was placed on an underground conveyor belt and taken im-

9. The Federal Respondent's reliance on this case is misplaced in any event. The *I.T.O. Corp. case* is what has become commonly referred to by the bar as the *Adkins* case. The opinion cited, 563 F.2d 646, is the Fourth Circuit's per curiam action following the Court's remand of the case to them for further consideration in light of *Caputo.* The Fourth Circuit simply stated that Adkins "satisfied both the status and situs requirements of the 1972 Amendments to the Act, as interpreted" by this Court in *Caputo* (563 F.2d at 648). This per curiam opinion of September 22, 1977 followed advices to the Clerk of the Court by letter dated September 14, 1977 from the attorney for the employer and insurance carrier that:

> "I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company have no objection to the entry of an order to the effect that, in view of the Supreme Court's decision in *Northeast Marine Terminal, Inc. v. Caputo,* 432 U.S. ——, their Petition for Review in this case is denied and the order of the Benefits Review Board is affirmed. This will dispose of the instant case.
>
> "I am informed by attorneys for the United States and for Mr. Adkins that they concur in this disposition."

A complete copy of the letter to the Clerk which reflects a copy was sent to the Federal Respondent's attorneys is printed in Addendum A, *infra,* page A-1. That Adkins was an amphibious worker just like Caputo and subject to assignment on navigable waters in addition to his duties in loading the truck is clear from the record in *Adkins.* See attached reprint from the Joint Appendix in *Adkins* in Addendum A, *infra,* pp. A-2 to A-4. It would have been foolhardy for the employer or the insurance carrier, or indeed even the Fourth Circuit to have held that Adkins did not meet the *Caputo* standard of an amphibious worker. Under the circumstances, and with the Fourth Circuit sitting in banc and the per curiam opinion issuing only 6 or 7 days after counsel's letter, we do not see how the Federal Respondent can seriously suggest to the Court that the Fourth Circuit has adopted the Board's view.

mediately to the shiploaders on the pier where it was loaded into the hold of a ship. Under these facts, it is perfectly clear that the three injured employees in *Conti* were engaged in "maritime employment" in the Federal Respondent's view since their work involved physical tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation. That the Fourth Circuit was fully aware of the Federal Respondent's view is clear from the Fourth Circuit opinion which quotes this view in full directly from this Court's opinion in *Caputo.*[10] The Fourth Circuit held these employees were not engaged in maritime employment because they were "unloading a coal train, not loading a vessel."[11]

As to the Third Circuit case relied on as accepting the Board's view, even the Federal Respondent had to acknowledge that it had gone even further than the Board and that, in fact, the Third Circuit's decision was based on its view that the Act as amended in 1972 should apply to the full extent of the limits of admiralty jurisdiction. This can hardly be classified as accepting the "Board's analysis," (Br. p. 20, fn. 12).

10. The Fourth Circuit opinion states:

> "The Director of the Office of Workers' Compensation Programs had urged upon the Court the view that 'maritime employment,' as used in the Amendments, should include 'all physical tasks performed on the waterfront, and particularly, those tasks necessary to transfer cargo between land and water transportation.' *Id.,* 432 U.S. at 272, 97 S.Ct. at 2361." 566 F.2d at 894.

11. 566 F.2d at 895. If the Fourth Circuit had adopted the Federal Respondent's view, the Longshoremen's Act would have been the employees' exclusive remedy, for when a railroad worker is injured within the jurisdiction of the Longshoremen's Act, the Federal Employers Liability Act for railroad workers is inapplicable. The Court expressly so held in *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1953).

In addition to the Ninth Circuit case recognized by the Federal Respondent to have rejected its construction of the term "maritime employment," which is still pending on a petition for certiorari, *Cargill v. Powell,* 573 F.2d 561 (9th Cir. 1977), the Ninth Circuit also applied the Court's amphibious worker definition of maritime employment from *Caputo* to a gearlockerman whose duties required him to work both on vessels and on adjoining areas in *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137 (9th Cir. 1978).

Thus, even if we consider the Third Circuit in the Federal Respondent's camp, it is at best an even split. But more significantly, the Ninth and Fourth Circuits, the only two courts which have discussed the Court's holding in *Caputo,* have both rejected the Board's view. Unfortunately, the Fifth Circuit's per curiam opinion on remand following *Caputo* is of no real help to anyone.

MARITIME EMPLOYMENT

The Federal Respondent suggests three alternative qualifications for employee status: as a longshoreman *or* a person engaged in longshoring operations *or* a person in maritime employment. (Br. p. 15). Petitioners submit that the statutory language requires that all covered employees be in maritime employment. 33 U.S.C. § 902(3). Longshoremen and those other persons engaged in longshoring operations are recognized by Congress to be subject to assignment aboard vessels, and therefore in maritime employment and subject to the pre-Amendment shifting coverage eliminated in 1972. A few brief comments are offered on three of the Federal Respondent's criticisms of Petitioners' suggested maritime employment status test, the first two criticisms having already been covered either in Petitioners' original or this reply brief.

1.

The Federal Respondent asserts Petitioners' test is inconsistent with *Caputo* because one gang may work on board a vessel and one gang may work on the dock in loading or unloading a vessel and cites the alleged practice of unloading bananas in Galveston (Br. pp. 31-32 and fn. 20). Unfortunately, the Respondent Bryant's Brief does not tell the whole story, for all such banana boat unloading workers are subject to being assigned to work either on the vessel or the dock. An interesting demonstration of this fact occurred approximately a year ago when two longshorewomen found the physical task of handling the bananas on board the vessel was greater than they were able to bear. Therefore, two of the longshoremen working on the dock were assigned to work aboard the vessel to replace them and the two ladies were assigned to complete their day's work on the dock where the physical tasks were not as heavy or onerous.

Whether the actual shifting of employees from the dock onto the vessel and vice versa during the course of a day's work is frequent or infrequent, as *Caputo* holds, it is the fact that the employee is subject to being assigned to work on navigable waters which makes him the amphibious worker for whom Congress desired to provide a uniform compensation remedy.

2.

The Federal Respondent suggests Petitioners' proposed maritime employment status test will make the coverage of the Act subject to the whim of the employer because an employer would allegedly be able to defeat coverage under the Act simply by organizing its longshoring operations so that some workers are permanently assigned to

work on the docks (Br. p. 32). This assertion by the Federal Respondent demonstrates a complete lack of familiarity with the facts of life on America's waterfronts. Any such change in work practices could be made only with the approval and agreement of the employees' labor unions. Neither Mr. Teddy Gleason's International Longshoremen's Association on the Atlantic and Gulf Coasts or Mr. Harry Bridges' International Longshoremen's & Warehousemen's Union on the Pacific Coast would tolerate any such unilateral action by an employer. To anyone even remotely familiar with the power of these longshore unions it is ludicrous to contend that the coverage of the Longshoremen's Act is subject to the whim of the employer by the simple expedient of assigning employees to work permanently on the docks. With the Union's permission? Perhaps. Without it? Impossible.[12] As noted above, an individual's duty at the moment of injury is not the touchstone. Petitioners submit that as conceived by the Congress, maritime employment encompasses an individual like Caputo because his employment could have taken him aboard a vessel, even though his duties at the moment of accident would not. Conversely, Ford and Bryant were not in maritime employment because no element of their respective employments could ever have taken them on the navigable waters.

12. The Court needs to be aware of the fact that the foreman of a longshore gang is the one who assigns the individual longshoremen to work either on the dock or on the vessel and it is the gang foreman who can change this assignment. The Stevedoring Superintendent cannot do so without the gang foreman's agreement. In the West Gulf area these gang foremen are elected by the union members and not by stevedoring company employers, and while an employer does not have to accept an incompetent gang foreman, he does not otherwise have any choice but to accept the gang foremen sent to him by the union from the union's hiring hall.

3.

The Federal Respondent suggests through a series of hypothetical questions that Petitioners' proposed test would present substantial administrative problems to him in the administration of the Act. The Petitioners' proposed test draws the jurisdictional line at substantially, if not exactly, the same place the Secretary of Labor has been drawing it for the purpose of his Safety & Health Rules for Longshoring since 1960. That he has not had to change it in nearly 19 years is persuasive evidence that such an approach is practical and workable.

Nor is there any cause for concern that the *Jensen* line is involved in determining the Act's jurisdiction ashore. This is the line that created the non-uniform compensation problem which Congress desired to eliminate. After 42 years, the Court finally made the *Jensen* line an arbitrary one—the water's edge. Then, and then only, were substantially all, if not all, of the Act's coverage questions resolved. The water's edge is readily discernible; what could be more simple or easy than using this congressionally decreed landmark to recognize the jurisdictional status? The inquiry is simply

> Was the injured employee subject to being assigned to work on both the landward and seaward sides of the *Jensen* line on the date of his accident?[13]

If so, he is an amphibious worker like Caputo for whom Congress intended to provide a uniform compensation system through the 1972 Amendments.

13. Or it would be:
Was the injured employee subject to being required to cross the *Jensen* line on the day of his accident?

Establishing a definitive jurisdictional line between federal and state jurisdictions may be one of the few places where arbitrariness is a virtue.[14] We submit Congress wanted the new jurisdictional line to be as definite as the *Jensen* line ultimately became, but obviously, without 45 years of litigation.

Petitioners respectfully submit that their proposed maritime employment status test provides such a definitive line, one that is faithful to the statute, the legislative history and to *Caputo*. We commend it to the Court.

REPLY TO RESPONDENTS JUDICIAL DEFERENCE ARGUMENTS

Respondents urge that principles of "liberality" and deference to the administrative agency should control the result in these cases, but the authorities presented are not in point on the present issue of the extent of federal coverage. The original Brief for Petitioners (at pp. 41-49) deals with these contentions in a manner not challenged by the Respondents, and a recent development from the Benefits Review Board further emphasizes the inapplicability of any principle of deference to the administrative agency. In November, 1978, the Board held that the presumption of the Act, 33 U.S.C. § 920 (a), is inapplicable to the question of employee status under Section 2(3) of the Act, 33 U.S.C. § 902(3). *Sedmak v. Perini North River Associates,* 9 B.R.B.S. 378, 382-383 (November 30, 1978). Relying on the *Dellaventura* and *Stockman* decisions cited by Petitioners at p. 47 n.81 of their original Brief, the Board held the

14. The federal diversity statute is a classic example where arbitrariness is a virtue. Imagine the chaos in the diversity jurisdiction cases if the statute said "approximately" $10,000, until the Court drew a "Jensen" line.

presumption to be inapplicable to the "threshold issue of coverage, such as status under Section 2(3), in the context of these cases," 9 B.R.B.S. at 383. Indeed, the Federal Respondent itself is apparently of two minds on this point, for although the presumption is raised on the coverage issue at page 35 of its Brief on the merits in No. 78-425, the inapplicability of the presumption was in effect acknowledged at p. 3 n. 2 of the Memorandum for the Federal Respondent in response to the Petition in No. 76-641, the first time these cases came to the Court.

Thus the Board and the Federal Respondent have parted company on the fundamental question of how this jurisdiction issue should be approached, and in the process have left the Court of Appeals below wholly without any administrative underpinning for its reliance on the allegedly "binding" force of the presumption. Cf. 539 F.2d at 541, Pet. App. p. 42. The allegedly consistent administrative treatment of this jurisdiction issue is therefore markedly impaired, and the Federal Respondent's deference argument is dramatically undercut by the absence of unanimity within the administrative structure.

In any event, the Respondents' make weight arguments of liberality, presumption and deference are inapplicable to the present jurisdictional/coverage question of statutory interpretation. Generally, the opinions in *Dellaventura,* 544 F.2d at 47, and *Stockman,* 539 F.2d at 269, explain why these concepts should not apply. Specifically, and in reply to the Respondents' briefs, the Federal Respondent misuses the "liberal construction" argument (and in so doing exposes the bootstrap character of his argument). The *Calbeck* and *Henderson* cases cited by the Federal Respondent are both navigable waters

cases, written in the context of the gap-filling function of the original Act. Cf. *Caputo,* 432 U.S. at 258. Liberal construction is not an appropriate tool for jurisdiction/coverage purposes, especially where pre-emption of the state remedy may be implied, as illustrated at pp. 41-42 of Petitioner's original Brief. The inapplicability of the presumption is illustrated by the Benefits Review Board's recent holding discussed above. The cases cited by the Federal Respondent on the judicial deference issue deal with matters of policy and discretionary balance, *N.L.R.B. v. Iron Workers,* or interpretation of an administrative regulation, *Udall v. Tallman,* or have ample demonstration of legislative intention without the deference principle, *Griggs v. Duke Power Co., Trafficante v. Metropolitan Life, Board of Governors v. First Lincolnwood Corp.* ("especially when Congress has refused to alter the administrative construction, * * * particularly when that construction accords with well-established Congressional goals", 47 L.W. pp. 4052, 4053). Finally, the Federal Respondent quotes only a portion of this Court's recent comment on the deference theory from *International Brotherhood of Teamsters v. Daniel,*____ U.S.____, 47 L.W. 4135, 4138 n. 20 (1979). (Br. p. 36 n. 22). Immediately following the language quoted by respondent, the Court went on to observe, and hold, that " * * * this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." 47 L.W. at 4138 n. 20.

CONCLUSION

In view of the fact that claimant Ford and claimant Bryant were not engaged in maritime employment, Petitioners respectfully pray that the Court reverse the decisions of the court below and hold that these claims are not covered by the Longshoremen's Act as amended in 1972.

Respectfully submitted,

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380

Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS
Houston, Texas

ADDENDUM A

September 14, 1977

Clerk, U. S. Court of Appeals
Federal Courthouse
10th and Main Streets
Richmond, Virginia 23219

Re: *I.T.O. Corporation of Baltimore, et al. v. Adkins* — No. 75-1051

Dear Sir:

I wish to advise the Court that I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company have no objection to the entry of an order to the effect that, in view of the Supreme Court's decision in *Northeast Marine Terminal, Inc. v. Caputo,* 432 U.S. ____, their Petition for Review in this case is denied and the order of the Benefits Review Board is affirmed. This will dispose of the instant case.

I am informed by attorneys for the United States and for Mr. Adkins that they concur in this disposition.

Very truly yours,

DAVID R. OWEN

DRO/bb

cc: William J. Kilberg, Esq.
Amos I. Meyers, Esq.
Thomas D. Wilcox, Esq.
Donald A. Krach, Esq.
John B. King, Jr., Esq.
Thomas W. Gleason, Jr., Esq.

EXCERPT FROM JOINT APPENDIX
NO. 75-1051—UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT
I.T.O. CORP. OF BALTIMORE, ET AL V.
WILLIAM T. ADKINS, ET AL
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APP. 22

(17) WILLIAM T. ADKINS,

was called as a witness in his own behalf, and having been first duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

* * * * * *

(17) (Judge Benn) I would like to know his date of birth?

(The Witness) January 20, 1928.

By Mr. Meyers:

* * * * * *

(18) Q. What kind of an education do you have? A. Fifth grade.

* * * * * *

(18) Q. Now, how long have you worked on the waterfront? A. 11 years.

Q. And will you tell His Honor when you began working on the waterfront and what kind of work you did? A. When I first started I was doing the same kind

of work I am doing now, but I was in a different local, 1429. So then—

(Judge Benn) But the record doesn't reflect what you were doing there. So, would you state that?

(The Witness) Sir?

(Judge Benn) You didn't answer the question about the type of work you were doing. You said it was the same type of work you are doing now.

(18) (The Witness) Operating a fork lift.

By Mr. Meyers:

Q. Did you also work aboard ship? (19) A. I worked on the ship and I worked on the piers, sometimes, you

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know. You can't work both at the same time. And on the weekends, maybe they would need extra tractor drivers or something, so I would work on a ship.

Q. Well, you worked and you were a member of what union? A. ILA.

Q. What number? A. 333.

Q. Now, it's 333. A. It was 858 first.

Q. It was 858? A. They took me out of 1429 in 1968, and had me transferred over to the 858 local.

Q. And 1429 was, well, what kind of union was it, ship ceilers? A. Yes, they worked ships too.

Q. And then, you changed over to the longshoremen union? A. Right, 858 in 1966.

Q. And during that time your employment was both aboard ship and on the pier? A. Right, anywhere the work is at, that's where I worked.

Q. On board ship, what kind of work did you do? A. Drive a tractor the same as I do on the pier.

(20) Q. The very same type work? A. That's right.

Q. Was it work that entailed loading and unloading of ships? A. Yes, right, right.

* * * * * *

(20) Q. You know the operation on the waterfront, tell us what work you were doing and what did it pertain to? What type of work? A. Well, the freight was on the pier and we was taking it up and putting it on the truck going out, loading the truck.

Q. Where did the freight come from? A. From out of the container off the ship.

(21) Q. It came off the ship? A. Right.

Q. And is that the kind of work you were doing on the date of your injury? A. I was loading the truck.

Q. And where did the freight come from. A. It come out of the container.